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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

## No. 157

BERNICE VINCE,

*Petitioner,*

*vs.*

GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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# INDEX.


| | PAGE |
|---|---|
| OPINION BELOW | 1 |
| STATEMENT | 2 |
| ARGUMENT | 5 |
| I. The petition shows no valid reason for granting certiorari | 5 |
| A. Jury trial | 5 |
| B. Lack of uniformity | 6 |
| II. Petitioner's criticisms of decision of Circuit Court of Appeals are confused and unsound | 7 |
| A. Proceedings neither legal nor equitable | 7 |
| B. Alleged misstatement of petitioner's position | 8 |
| C. Reliance on application | 8 |
| D. Duty to investigate further | 10 |
| E. Burden of proof | 11 |
| F. Medical Examiner's information | 13 |
| G. Intent to deceive | 14 |
| III. The decision of the Circuit Court of Appeals is well founded on the law and the evidence | 15 |
| CONCLUSION | 15 |

## Table of Cases Cited.

PAGE

Bonewell v. North American Accident Ins. Co. (1911), 167 Mich. 274, 276; 132 N. W. 1067 ..... 12

Brown v. Metropolitan Life Ins. Co. (1887), 65 Mich. 306, 313, 314; 32 N. W. 610 ..... 11, 13

Bullock v. Mutual Life Ins. Co. (1911), 166 Mich. 240; 131 N. W. 574 ..... 12

Equitable Life Assurance Society of United States v. Strasberg (Ind. 1938), 14 N. E. (2d) 703, 704 .. 13

Henson v. John Hancock Mutual Life Ins. Co. (1933), 261 Mich. 693; 247 N. W. 102 ..... 12

Kane v. Detroit Life Ins. Co. (1918), 204 Mich. 357; 170 N. W. 35, 38 ..... 14

Krajewski v. Western and Southern Life Ins. Co. (1928), 241 Mich. 396, 402; 217 N. W. 62 ..... 13

Lawrence v. Conn. Mut. Life Ins. Co. (C. C. A. 6, 1937), 91 Fed. (2d) 381, 384 ..... 14

Metropolitan Life Ins. Co. v. Beeraft (Ind. 1938), 12 N. E. (2d) 952 ..... 13

Metropolitan Life Ins. Co. v. Freedman (1909), 159 Mich. 114, 116; 123 N. W. 547, 548 ..... 12, 14

Metropolitan Life Ins. Co. v. Jankowski (1938), 285 Mich. 291; 280 N. W. 766 ..... 12

Mutual Life Ins. Co. v. Geleynse (1928), 241 Mich. 659, 663; 217 N. W. 790 ..... 12, 13

New York Life Ins. Co. v. Cohen, et al. (C. C. A. 6, 1932), 57 Fed. (2d) 494-495 ..... 14

North American Life Assurance Co. v. Jones, Admx. (1939), 287 Mich. 298; 283 N. W. 587 ..... 11

PAGE

Pacific Indemnity Co. v. McDonald (C. C. A. 9), 107 F. (2d) 446..... 6

Rhode v. Metropolitan Life Ins. Co. (1901), 129 Mich. 112; 88 N. W. 400, 401; (1903) 132 Mich. 503; 93 N. W. 1076.....11, 12, 13

Rickert v. Travelers Ins. Co. (1937), 282 Mich. 538, 545; 276 N. W. 546..... 12

Ruggirello v. Detroit Automobile Inter-Ins. Exchange (1935), 272 Mich. 44; 260 N. W. 787..... 14

Ruhlin, et al. v. New York Life Ins. Co. (1938), 304 U. S. 202; 58 Sup. Ct. Rep. 860, 862..... 6

Stipcich v. Metropolitan Life Ins. Co. (1928), 277 U. S. 31; 48 S. Ct. 512; 72 L. Ed. 895..... 10

STATUTES CITED.

Declaratory Judgment Act, 28 U. S. C. A. 400, (3).. 6

17 Mich. Stats. Anno. Sec. 24, 280 pp. 556-7..... 13

TEXTBOOKS CITED.

Corpus Juris, Sec. 14 (c) p. 1071; Sec. 18 ee. p. 1076; Sec. 19 ff. p. 1078..... 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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## BRIEF FOR RESPONDENT IN OPPOSITION.

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### OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the 6th Circuit is officially reported in 118 F. (2d) 232. No rehearing was sought in the Court of Appeals (R. 206-213).

## STATEMENT.

Respondent filed its complaint in the District Court for a declaratory judgment pursuant to the Federal Declaratory Judgment Act (28 U. S. C. A. 400), to have adjudicated the rights between it and petitioner and one Thomas G. Andris (an assignee of part of petitioner's rights which were released in the course of the trial), growing out of a life insurance policy issued by respondent to William A. Vince, husband of petitioner, on April 29, 1937, in the amount of $6,000.00. Petitioner answered and filed a counterclaim to recover the policy proceeds. Petitioner demanded a trial by jury and a jury trial was allowed on all issues. Respondent moved for a directed verdict at the close of all the evidence on all issues under both the complaint and the counterclaim (R. 137), and after verdict and judgment against it on those issues moved for judgment notwithstanding the verdict or in the alternative for a new trial (R. 158-159). All of these motions were denied and respondent appealed. On appeal the judgment was reversed and the case remanded with directions to grant the motion n.o.v. and to enter a decree or judgment declaring the policy null and void.

The complaint was bottomed upon representations made by Vince in his application for the policy consisting of representations, (1) that he had not received treatment in any hospital, sanitarium or asylum, (2) had never suffered from any disorder of the respiratory system such as pneumonia, asthma, bronchitis, chronic cough, tuberculosis, spitting of blood, etc., and (3) had not within the previous seven years consulted with any physician other than one named as having been consulted in connection with an earlier tonsilectomy (R. 3-4). After claim to the policy proceeds was made upon the death of Vince

on March 14, 1938, respondent discovered facts showing these representations to have been false and thereupon declared the policy void *ab initio* (R. 9, 84-85). The theory was that the misrepresentations voided the policy because they (1) were made with actual intent to deceive, (2) materially affected the acceptance of the risk, and (3) materially affected the hazard assumed by insurer (R. 8).

Vince had had the policy in his possession with a photostat of the application appended for approximately eleven months before his death (R. 70). It was shown that the above mentioned representations were false because of circumstances surrounding diseases suffered by Vince on two different occasions, one being a serious attack of pneumonia in 1926-27 and the other being a serious case of respiratory ailment during the winter of 1931-32. No information in respect of these illnesses was disclosed in the application. Preliminary to issuance of the policy respondent's underwriter had information apart from information received from Vince that Vince had suffered from pneumonia in 1926-27 but this information went no farther than to indicate that the pneumonia suffered at that time was simple in nature and short in duration (R. 70, 73, 74). Respondent later discovered that this illness had been serious (so alleged in the complaint, R. 7—not denied by the answers, R. 14). It had no information of the existence or extent of the 1931-32 illness (R. 70, 82, 84). Admissions in the answers were relied upon to establish the facts respecting the 1926-27 illness, and the evidence adduced established the facts surrounding the 1931-32 illness.

It was shown by uncontradicted evidence that the course of the 1931-32 illness was briefly as follows: Vince took sick in Philadelphia, where he was taken to a hos-

pital and consulted with two physicians (R. 54). Thereafter he entrained for Jackson, Michigan, in a collapsed condition (R. 54, 64). He was underweight, nervous, apprehensive (R. 63), and spat blood (R. 104). He was placed under intensive treatment consisting of diathermy and ultraviolet ray, was given tonic medication (R. 63) and put to bed (R. 104). He was treated by or consulted with doctors in Jackson, and Chicago (R. 45-52, 60, 63). His ailment was that of a lung involvement, lung abscess and cavity under the 7th and 8th ribs on the left side, infection of the hilus glands, bilateral bronchiectasis (R. 45, 47, 51, 60). He remained away from work and suffered continuous disability for nine months during which time disability benefits were paid by International Harvester Company (R. 53-58). His subsequent death was due to lung abscess under the 7th and 8th ribs on the left side (R. 123), and attending infections. Respondent's theory was that the cause of death was immaterial under the issues except as the circumstances surrounding the event bore upon the seriousness of the illness of 1931-32, and the District Court so charged the jury (R. 151, 152; see point (f) Pet. 5).

## ARGUMENT.

### I.

**The petition shows no valid reason for granting certiorari.**

A. *Jury Trial.* Petitioner demanded and had in the District Court a trial by jury on all issues (see Pet. 3). The trial was conducted in all respects in the manner of a jury trial, including the reception of evidence, the usual motions, customary jury instructions, rendition of verdict and judgment thereon. The issues under the complaint and counterclaim were identical and no distinction was made between them either in the District Court or in the Circuit Court of Appeals. The complaint was bottomed upon misrepresentations in the application and the defense to the counterclaim was the same. Contrary to the inference in the petition (pp. 6-7) this element of fraud in the inducement for the policy was dealt with as in an action at law and tried to a jury. The Court of Appeals not only approved of the method of trial in the District Court but held that a trial by jury was there required. The proper granting of a motion n.o.v. is not a denial of a trial by jury. The statement in the petition (pp. 5-6) that the Court of Appeals ruled that only the issues raised by the counterclaim should have been submitted to the jury is challenged, and is, it is submitted, due to misinterpretation of the opinion. The opinion is further criticised because of the statement that the triable issues of fact should have been submitted to the jury upon special interrogatories for the guidance of the court in adjudication of the declaratory relief prayed.

This criticism is unwarranted since interrogatories are provided for under the Declaratory Judgment Act. 28 U. S. C. A. 400 (3).

B. *Lack of Uniformity.* As to questions controlled by state law conflict among circuits is not of itself a reason for granting a writ of certiorari. *Ruhlin, et al.* v. *New York Life Ins. Co.* (1938), 304 U. S. 202; 58 Sup. Ct. Rep. 860, 862.

In the "argument" petitioner states (pp. 17-18) that the decision in the case of *Pacific Indemnity Co.* v. *McDonald* (C. C. A. 9), 107 F. (2d) 446, has been adopted by other circuits, citing in support of the statement decisions in the 2nd, 3rd and 4th circuits, and states that the 6th circuit is in conflict with all other circuits which have passed upon the point. In the "brief" petitioner states (p. 14) that the 6th circuit is not in uniformity with the 2nd, 3rd, 4th and 9th circuits. Thus petitioner contends that all circuits except the 6th are in accord on the law as found in the 9th circuit in the Pacific Indemnity case.

It is submitted that no disagreement between the 6th and 9th circuits is shown. Apparently petitioner relies solely upon an alleged variance between the opinion of the 6th circuit in the instant case and the decision in the 9th circuit in the Pacific Indemnity case to show the claimed lack of uniformity. It is submitted that there is no lack of uniformity between these opinions. In the Pacific Indemnity case the 9th circuit held (p. 448 of the report) that a declaratory judgment proceeding is neither legal nor equitable in nature and whether the issues involved shall be disposed of by a court or jury depends upon the setting in which the issues are framed. Issues ordinarily disposed of in actions at law may require a

trial by jury whereas issues usually disposed of in chancery proceedings will not require a jury trial. The Court of Appeals in the instant case in no manner disapproves of the principles announced in the Pacific Indemnity case nor of the principles in respect of declaratory judgment proceedings announced in any other case.

In commenting upon the Pacific Indemnity case the petition (p. 7) quotes from the opinion of the Court of Appeals in the instant case at a point where the writer of the opinion was addressing himself in comment upon the Pacific Indemnity case. In the quotation the sentence "This course was not disapproved" appearing at the end of the quotation is emphasized evidently to point out language supposedly giving rise to the alleged lack of uniformity. And later petitioner alleges (p. 15) the foregoing to be a misquotation contrary to applicable decisions of this court and of other courts. It is submitted that a reading of the opinion discloses that the emphasized last sentence is a statement that in the Pacific Indemnity case the reviewing court did not disapprove of the views of the District Court in which the case was tried, and that the sentence is in no sense an expression of dissent from the holding in the Pacific Indemnity case. It is denied that the petition shows any lack of uniformity or other reason for the granting of the writ of certiorari as required under rule 38, 5 (a) and (b).

## II.

### Petitioner's criticisms of decision of Circuit Court of Appeals are confused and unsound.

A. *Proceeding Neither Legal Nor Equitable.* In stating that the Court of Appeals apparently reviewed the case as a proceeding in equity (Pet. 8) there is an obvious

failure to recognize the character of proceedings under the Declaratory Judgment Act. The holding on appeal appears to be that the issues were set as in an action at law and therefore should have been so disposed of (as they were); and the proceeding not being equitable in nature, the equitable relief of cancellation could not be granted, but only a declaration as to the invalidity of the policy was permitted. A directed verdict for respondent necessarily had to be followed by a decree or judgment (which it should be called being unimportant) that the policy was null and void, being the final order contemplated by the Act.

B. *Alleged Misstatement of Petitioner's Position.* The claim (Pet. 8-9) that the Circuit Court of Appeals misstated petitioner's position in the trial and reviewing courts regarding false statements in the application appears to have no better premise than that the Court of Appeals failed to discuss in its opinion the points urged by petitioner. Their omission from the opinion is no indication that they went unnoticed but rather is it an indication of their unsoundness. No misstatement as such in the opinion is anywhere pointed out by the petition.

C. *Reliance on Application.* There is no sound basis in the record to support the allegation (Pet. 9, 15) that the Court of Appeals should have found that respondent did not rely on the statements in the application. The claimed basis for the allegation is that according to the admission of respondent's chief underwriter respondent would have accepted the risk if the illness complained of had been disclosed in the application (Pet. 3). This broad statement is largely untrue and decidedly misleading. In making the statement petitioner fails to dis-

tinguish between the 1926-27 illness and the 1931-32 illness and the reader is left to suppose that the alleged admission encompassed both illnesses. He is left to discover that in making the statement petitioner probably means to refer only to the 1926-27 illness. The statement is positively erroneous insofar as it encompasses any alleged admission respecting the 1931-32 illness and it is even without foundation as to the 1926-27 illness.

The underwriter in question did not testify that he would have accepted the risk if either of the illnesses complained of had been disclosed in the application. What he did testify to was that his information that the 1926-27 illness was a simple case of pneumonia of short duration did not deter him from accepting the risk (R. 70, 81, 82). He did not say that he would have accepted the risk had he known from disclosure in the application or from other sources that the 1926-27 illness was a serious case of pneumonia but on the contrary he testified that had he known of the seriousness of that illness he would not have accepted the application without further investigation (R. 70). As to the 1931-32 illness, the record discloses nothing but positive testimony of the chief underwriter that he would not under any circumstances have accepted the application without further investigation had he had information respecting that illness (R. 70-71).

The positive testimony of the underwriter is that there was no provision or statement in Part II of the application containing the questions and answers on the prior condition of health of the applicant upon which he did not rely in passing upon the application and in issuing the policy (R. 69-70). It goes without saying that respondent was prejudiced by its reliance upon the truth of the application (see Pet. 19). Any claim that re-

spondent did not rely upon the statements in the application or that it was not prejudiced by so doing finds no support in the record.

D. *Duty to Investigate Further.* It is asserted that respondent having knowledge showing an inconsequential illness was charged with a duty to make an independent investigation (Pet. 15). The assertion fails to take into consideration the nature of insurance contracts. Respondent was not required to approach consideration of the application with suspicion that the applicant was trying to defraud it; nor was the applicant permitted to withhold information and charge respondent with the obligation of discovering it from other sources. It had a right to rely upon the statements in the application and the fact that there was an omission in the application of reference to the 1926-27 illness, which according to respondent's information was not serious, was not calculated to arouse any suspicion on respondent's part because an omission of an illness of passing consequences is nothing unusual. Insurance policies are contracts *uberrimae fidei* and respondent had the right to believe that all facts material to its acceptance of the application or the risk were properly disclosed in the application. *Stipcich* v. *Metropolitan Life Ins. Co.* (1928), 277 U. S. 31, 48 S. Ct. 512, 72 L. Ed. 895.

The applicant was required to disclose any facts peculiarly within his knowledge. 26 Corpus Juris, Sec. 14 (c) p. 1071; Sec. 18 ee. p. 1076; Sec. 19 ff. p. 1078.

Furthermore, as pointed out in the opinion on appeal, there is clear authority in the Michigan decisions that even its own earlier records do not put the insurer upon notice of the falseness of statements in the application

unless there is some circumstance that directs attention to them.

*Brown* v. *Metropolitan Life Ins. Co.* (1887), 65 Mich. 306, 314; 32 N. W. 610.

*Rhode* v. *Metropolitan Life Ins. Co.* (1901), 129 Mich,. 112; 88 N. W. 400; (1903) 132 Mich. 503; 93 N. W. 1076.

In *North American Life Assurance Co.* v. *Jones, Admx.* (1939), 287 Mich. 298; 283 N. W. 587, the beneficiary contended in a proceeding to cancel a policy that insurer was a member of a Recording and Statistical bureau to which reports are submitted by insurers concerning applicants for insurance and in the opinion a lengthy resume of information which insurer had before it from this bureau at the time it issued the policy was quoted. Defendant asserted that this information had put insurer on notice of heart trouble affecting its insured but the court held to the contrary and remarked that while the record revealed a knowledge of insured's condition in certain respects, still there was nothing in the record indicating any knowledge on the part of plaintiff at the time of issuing the policy that insured had repeatedly consulted physicians nor that plaintiff had reason to suspect a heart condition. The information which might have demanded further investigation was far more extensive and significant than the bare information of the 1926-27 simple pneumonia in the instant case, yet cancellation was not denied for lack of further investigation. Respondent had no information through exchange of information or otherwise of the more serious illness of 1931-32.

E. *Burden of Proof.* Contrary to the allegation in the petition (p. 10) respondent fully maintained its burden of proof. No substantial instance is pointed out in the petition where respondent failed to maintain the burden

of proof. The application for the insurance received in evidence (R. 37-44) proved that the statements relied upon were in fact made and under Michigan decisions the beneficiary was estopped to deny that those statements were made.

*Metropolitan Life Ins. Co.* v. *Freedman* (1909), 159 Mich. 114, 116; 123 N. W. 547.

*Bonewell* v. *North American Accident Ins. Co.* (1911), 167 Mich. 274, 276; 132 N. W. 1067.

*Mutual Life Ins. Co.* v. *Geleynse* (1928), 241 Mich. 659; 217 N. W. 790.

*Henson* v. *John Hancock Mutual Life Ins. Co.* (1933), 261 Mich. 693; 247 N. W. 102.

*Metropolitan Life Ins. Co.* v. *Jankowski* (1938), 285 Mich. 291; 280 N. W. 766.

Respondent proved the statements to be false because of the 1926-27 illness and particularly because of the 1931-32 illness and the hospitalization and consultations with and treatments by physicians in connection therewith. This proof with the accompanying element of seriousness was never controverted by evidence but on the contrary stands unchallenged by the record. The burden was on petitioner to show the illnesses were not serious and this petitioner wholly failed to do.

*Rhode* v. *Metropolitan Life Ins. Co.* (1901), 129 Mich. 112, 88 N. W. 400, 401; (1903) 132 Mich. 503; 93 N. W. 1076.

*Bullock* v. *Mutual Life Ins. Co.* (1911), 166 Mich. 240; 131 N. W. 574.

*Rickert* v. *Travelers Ins. Co.* (1937), 282 Mich. 538, 545; 276 N. W. 546.

Under the Michigan statute the policy here involved was void *ab initio* if the false answers contained in the application were made with (1) intent to deceive, or (2) were in respect of matters either material to the ac-

ceptance of the risk, or (3) to the hazard assumed. The statute (incorrectly quoted in the petition, p. 18) is as follows:

> "False statements in application; effect. Sec. 17. The falsity of any statement in the application for any policy covered by this chapter shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. (C. L. '29, Sec. 12444)."

17 Mich. Stats. Anno. Sec. 24.280, pp. 556-7.

*Krajewski* v. *Western and Southern Life Ins. Co.* (1928), 241 Mich. 396, 402; 217 N. W. 62.

Under Michigan law information surrounding a serious illness is material to the acceptance of the risk and to the hazard to be assumed.

*Brown* v. *Metropolitan Life Ins. Co.* (1887), 65 Mich. 306, 313; 32 N. W. 610.

*Mutual Life Ins. Co.* v. *Geleynse* (1928), 241 Mich. 659, 663; 217 N. W. 790.

*Rhode* v. *Metropolitan Life Ins. Co.* (1901), 129 Mich. 112; 88 N. W. 400, 401; (1903) 132 Mich. 503; 93 N. W. 1076.

See also: *Equitable Life Assurance Society of United States* v. *Strasberg* (Ind. 1938), 14 N. E. (2d) 703, 704.

*Metropolitan Life Ins. Co.* v. *Becraft* (Ind. 1938), 12 N. E. (2d) 952.

F. *Medical Examiner's Information.* Petitioner states that applicant informed respondent's medical examiner of disorders complained of at the time of making application (Pet. 5). Because of the breadth of this statement it is untrue. Petitioner offered testimony of Thomas G. Andris that he was present at the time respondent's medical examiner examined the applicant. He purported to remember without reference to any record the answers Vince supposedly made to some thirty odd questions put

more than two years previously by the medical examiner (R. 92). This witness testified that Vince told the medical examiner that he had had pneumonia at a prior time but that it was not of a serious nature (R. 90). This was the full extent of the testimony upon which petitioner bases the statement here dealt with (R. 90). Andris did not claim that Vince told the doctor that his troubles had involved a lung abscess or bronchiectasis, but simple pneumonia not of a serious nature was the only disclosure that he claimed was made. If we take this testimony at its full face value it did not in fact contradict the representations made in the application since a failure to disclose a fleeting illness would not necessarily amount to deception. The testimony of Andris' was admitted for its bearing only upon the question of intention to deceive and not for the purpose of contradicting the statements made in the application (R. 145-146). And the testimony in no sense rebutted the presumptive case of intention to deceive found in the failure of applicant to disclose that he had spat blood and had a lung abscess or cavity and bronchiectasis on a prior occasion.

G. *Intent to Deceive.* Silence in respect of these prior illnesses, consultations and treatments at the time the application was made and during the period the policy with a copy of the application attached was in his possession is persuasive proof of the applicant's fraudulent intent.

*Lawrence* v. *Conn. Mut. Life Ins. Co.* (C. C. A. 6, 1937), 91 Fed. (2d) 381, 384.

*New York Life Ins. Co.* v. *Cohen, et al.* (C. C. A. 6, 1932), 57 Fed. (2d) 494-495.

*Ruggirello* v. *Detroit Automobile Inter-Ins. Exchange* (1935), 272 Mich. 44; 260 N. W. 787.

*Kane* v. *Detroit Life Ins. Co.* (1918), 204 Mich. 357; 170 N. W. 35, 38.

*Metropolitan Life Ins. Co.* v. *Freedman* (1909), 159 Mich. 114; 123 N. W. 547, 548.

## III.

**The decision of the Circuit Court of Appeals is well founded on the law and the evidence.**

The uncontradicted evidence shows that the representations complained of were made and that they were false in respects material to the acceptance of the risk and the hazard assumed; and that they were accompanied by intention to deceive. It also shows that respondent issued the policy in reliance upon those representations and after discovering their falsity elected to rescind *ab initio*. With such a record we submit only one result was fitting, being the result reached by the Circuit Court of Appeals.

## CONCLUSION.

It is respectfully submitted that the petition should be denied.

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